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No. 84-761

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

DATA GENERAL CORPORATION,
Petitioner,
v.

DIGIDYNE CORPORATION and FAIRCHILD CAMERA AND INSTRUMENT CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR COMPUTER AUTOMATION, INC., DATAPOINT CORPORATION, DIGITAL EQUIPMENT CORPORATION, HEWLETT-PACKARD COMPANY, MANAGEMENT ASSISTANCE INC., AND TANDEM COMPUTERS INCORPORATED AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION OF DATA GENERAL CORPORATION

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MOTION OF COMPUTER AUTOMATION, INC., DATAPOINT CORPORATION, DIGITAL EQUIPMENT CORPORATION, HEWLETT-PACKARD COMPANY, MANAGEMENT ASSISTANCE INC., AND TANDEM COMPUTERS INCORPORATED FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION OF DATA GENERAL CORPORATION

Computer Automation, Inc., Datapoint Corporation, Digital Equipment Corporation, Hewlett-Packard Company, Management Assistance Inc., and Tandem Computers Incorporated (*"amici"*) hereby move, pursuant to Rule 36.1 of the Rules of this Court, for leave to file the attached brief as *amicus curiae* in support of the petition of Data General Corporation for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit. Data General has consented to the filing of the brief; Digidyne and Fairchild have withheld their consent.

Amici are manufacturers or suppliers of general purpose "mainframe" computers, minicomputers or microcomputers and related components and software. *Amici* seek leave to file the attached brief because, as fully explained in the brief, the decision of the court of appeals casts a cloud over a diverse range of efficiency-enhancing and procompetitive product development, distribution and marketing initiatives throughout the American computer industry and may thereby chill innovation and competition in this critical sector of the economy.

The arguments presented in Data General's petition and in the attached brief demonstrate that the decision below is fundamentally at odds with the holdings of this Court in *Jefferson Parish Hospital District No. 2 v. Hyde*, 104 S. Ct. 1551 (1984), and *United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610 (1977), and is in conflict with the holdings of other courts of appeals. Review of the decision below is necessary to correct the court of appeals' misapplication of the law and to prevent adverse effects in the highly competitive computer industry.

Respectfully submitted,

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BRIEF OF COMPUTER AUTOMATION, INC., DATAPOINT CORPORATION, DIGITAL EQUIPMENT CORPORATION, HEWLETT-PACKARD COMPANY, MANAGEMENT ASSISTANCE INC., AND TANDEM COMPUTERS INCORPORATED AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION OF DATA GENERAL CORPORATION

INTEREST OF *AMICUS CURIAE*

Computer Automation, Inc., Datapoint Corporation, Digital Equipment Corporation, Hewlett-Packard Company, Management Assistance Inc., and Tandem Computers Incorporated (*"amici"*) manufacture or supply general purpose "mainframe" computers, minicomputers or microcomputers, and related components and soft-

ware.[1] *Amici* believe that review of the decision below is imperative, both because the court of appeals misapplied the law set forth by this Court and because the precedent set by the court of appeals' decision may inhibit American computer manufacturers from undertaking a wide range of efficiency-enhancing and procompetitive initiatives, thereby chilling innovation and competition in this critical sector of the economy.

The court of appeals held that Data General's "bundled" sales policy of not licensing its operating system software to those who do not also buy its CPU is *per se* unlawful under Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 3 of the Clayton Act, 15 U.S.C. § 14. In reaching this conclusion, the court of appeals failed to undertake the analysis required by this Court in *Jefferson Parish Hospital District No. 2 v. Hyde*, 104 S. Ct. 1551 (1984) ("*Hyde*"), and *United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610 (1977) ("*Fortner II*"), to determine whether Data General has market power—the ability to raise prices or to force customers to accept burdensome terms—in its software. Rather, the court concluded that a finding that Data General has market power was proper simply because its software is "sufficiently attractive to some customers." *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336, 1346 (9th Cir. 1984), Appendix to Petition for Writ of Certiorari, App. A at 1a, 17a, *Data General Corp. v. Digidyne Corp.*, No. 84-761 (U.S. filed November 9, 1984) (hereinafter "Petitioner's App. —— at ——.")

[1] The core of every computer is the central processing unit ("CPU" or "hardware"), the physical object that performs the computer's basic tasks. Computer programs ("software") are written to help the CPU perform its job. Application software is written to tell the CPU which task (e.g., word processing) to perform. Operating system software is designed as an intermediary between the CPU and the application software, to enable the CPU to perform its job as efficiently as possible.

The court also held that the copyright on Data General's software created a presumption of market power. *Id.* at 1344, Petitioner's App. A at 13a-14a.

The court of appeals' conclusions regarding market power do not square with reality in the computer industry. The industry is one of the nation's most competitive; it is "more price sensitive than ever before."[2] The decision below may mean, however, that *every* firm producing operating system software for use with its hardware is deemed to have market power because, almost by definition, each firm's software is "sufficiently" attractive to some subset of its customers. Similarly, the court of appeals' holding that the existence of a copyright creates a presumption of market power applies to nearly every software producer, since it is common practice to copyright software. The decision below thus produces the paradox that nearly every firm in this intensely competitive industry is deemed to have market power sufficient to restrain competition. Because many distribution and marketing practices are much more vulnerable to antitrust liability when undertaken by a firm deemed to possess market power than when undertaken by a firm lacking such power,[3] the decision below exposes virtually every computer manufacturer to the daunting prospect of treble damage claims whenever its approach to distribution or marketing is more successful than a competitor's.

More fundamentally, the court of appeals' decision threatens a "wholesale restructuring of the computer in-

[2] S. McClellan, *Surviving the Computer Shakeout*, Dun's Business Month 89, 93 (June 1984).

[3] *See, e.g., Jack Walters & Sons Corp. v. Morton Bldg., Inc.*, 737 F.2d 698, 702 (7th Cir.), *cert. denied*, 53 U.S.L.W. 3365 (U.S. Nov. 13, 1984); *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 678 F.2d 742, 745 (7th Cir. 1982); *Graphic Prod. Distrib., Inc. v. Itek Corp.*, 717 F.2d 1560, 1568 (11th Cir. 1983); *Muenster Butane, Inc. v. Stewart Co.*, 651 F.2d 292, 298 (5th Cir. 1981).

dustry."[4] Innovating companies must engage in costly research and development to generate the software needed to make their hardware offerings attractive and competitive. Under the decision below, however, such firms now may also be required to make their operating system software available worldwide to all would-be competitors at competitive license fees, thus allowing such competitors to take advantage of only those portions of the firm's creative efforts that have proved to be most successful.

As this Court explained in *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 222 (1980), that result could have a drastic effect on an innovator's incentive and ability to compete with its freeriding competitors:

> [T]he rewards available to those willing to undergo the time, expense, and interim frustration of such practical research would provide at best a dubious incentive. Others could await the results of the testing and then jump on the profit bandwagon by demanding licenses to sell . . . . As a result, noninventors would be almost assured of an opportunity to share in the spoils, even though they had contributed nothing to the discovery. The incentive to await the discoveries of others might well prove sweeter than the incentive to take the initiative oneself.

By calling into question virtually every attempt to integrate sales of hardware and operating system software, moreover, the court of appeals' decision impairs the ability of computer manufacturers to maintain customer goodwill. As a generality, operating system software will not function as reliably or efficiently if used with "foreign" CPUs as with the manufacturer's own CPU. Accordingly, to avoid "finger-pointing" or being blamed for the failures of their competitors' products,

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[4] M. Scott, *DG Antitrust Decision: An Incentive To Imitate?* Computerworld 49 (Sept. 17, 1984).

many manufacturers find it necessary to sell hardware and operating system software on an integrated basis. The decision below may foreclose that option.

SUMMARY OF ARGUMENT

The court of appeals' holding that a finding of market power could be based on the attractiveness of Data General's software to some customers plainly conflicts with *Fortner II* and *Hyde*. These cases require, as a prerequisite to applying the *per se* rule in alleged tie-in cases, an analysis into competitive conditions in a relevant market and a determination, based on such an analysis, that the defendant has market power in the market for the tying product. The court of appeals' failure to engage in the required analysis is in conflict with every other court of appeals decision applying the *Fortner II* and *Hyde* mandate. The decision below also is contrary to *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) ("*Sylvania*") and *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*, 104 S. Ct. 2948 (1984) ("*NCAA*"), which caution against "formalistic" application of *per se* rules.

The court of appeals also held that market power could be presumed from the mere existence of a copyright on Data General's software. This presumption is contrary to the market analysis required by *Hyde* and *Fortner II*. It is also specious. While a copyright may protect a particular expression of a concept, it does not protect the concept itself. Data General's competitors therefore are free to offer fully competitive alternatives to Data General's software, notwithstanding the copyright. Accordingly, the mere existence of a copyright does not rationally support a presumption of market power.

ARGUMENT

REVIEW IS NECESSARY BECAUSE THE COURT OF APPEALS FAILED TO UNDERTAKE THE MARKET ANALYSIS REQUIRED BY *HYDE* AND *FORTNER II* AND THUS MISAPPLIED THE LAW.

A. The court of appeals held that a finding that Data General has market power could be based simply on the fact that its software is "sufficiently attractive to some customers." 734 F.2d at 1346, Petitioner's App. A at 17a.[5] This holding is plainly contrary to this Court's rulings in *Fortner II* and *Hyde*. In *Fortner II*, the Court held that a plaintiff asserting the *per se* rule against an alleged tie-in must show that the defendant "has the power, within the market for the tying product, to raise prices or to require purchasers to accept burdensome terms that could not be exacted in a completely competitive market." *Fortner II*, 429 U.S. 610, 620 (1977) (footnote omitted). In *Hyde*, the court held that "any inquiry into the validity of a tying arrangement must focus on the market or markets in which the two products are sold" and on whether the defendant "has some special ability—usually called 'market power'—to force a purchaser to do something that he would not do in a competitive market." *Hyde*, 104 S. Ct. 1551, 1561, 1559 (1984). *Fortner II* and *Hyde* thus require, as a prerequisite to application of the *per se* rule, an analysis into actual market conditions to determine whether the defendant has market power.[6]

[5] The court of appeals expressly refused to review the record "for what it may reveal as to defendant's position in a defined market in which defendant's [software] was sold." *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336, 1341 (9th Cir. 1984), Appendix to Petition for Writ of Certiorari, App. A at 1a, 8a, *Data General Corp. v. Digidyne Corp.*, No. 84-761 (U.S. filed Nov. 9, 1984) (hereinafter "Petitioner's App. —— at ——.")

[6] The *'per se'* doctrine in tying cases has thus always required an elaborate inquiry into the economic effects of the tying arrangement.

Hyde, 104 S. Ct. 1551, 1570 (1984) (O'Connor, J., concurring) (footnote omitted).

In non-tying cases as well, the Court has consistently rejected the application of *per se* rules where analysis into market conditions may demonstrate that the challenged practice is procompetitive. In *NCAA*, the Court stated that

> [p]*er se* rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct. For example, while the Court has spoken of a *'per se'* rule against tying arrangements, it has also recognized that tying may have procompetitive justifications that make it inappropriate to condemn without considerable market analysis.

104 S. Ct. at 2962 n.26. And, in *Sylvania*, the Court concluded that any departure from the rule-of-reason standard "must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing." 433 U.S. at 58-59.

The court of appeals in this case dispensed with—and, in fact, eschewed—any analysis into market conditions. Instead, it held that a finding of market power could be based on a mere showing that Data General's software was attractive to some of its customers. That is precisely the kind of superficial analysis this Court rejected in *Hyde* as a basis for showing market power. In *Hyde*, the plaintiff sought to establish the defendant's market power over hospital operating rooms by relying on the preference of nearby residents for the defendant's hospital. The Court concluded, however, that "[a] preference of this kind . . . is not necessarily probative of significant market power. . . . [T]he geographic data does not establish the kind of dominant market position that obviates the need for further inquiry into actual competitive conditions." *Hyde*, 104 S. Ct. at 1566. Here, too, the fact that many consumers prefer Data General's software to other software is not probative of significant market power; "further inquiry into actual competitive conditions" is essential to determine whether Data Gen-

eral has the ability to raise prices or to require purchasers to accept burdensome terms. *Id.* The court of appeals failed to make such an inquiry. Accordingly, review of the decision below is necessary to prevent misapplication of *Hyde* and *Fortner II*.

B. Every court of appeals decision after *Hyde*—except the decision below—has undertaken the required market analysis. *E.g., Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698, 702-08 (7th Cir.), *cert. denied*, 53 U.S.L.W. 3365 (U.S. November 13, 1984); *Spartan Grain & Mill Co. v. Ayers*, 735 F.2d 1284, 1285-88 (11th Cir. 1984); *Konik v. Champlain Valley Physicians Hospital Medical Center*, 733 F.2d 1007, 1017-18 (2d Cir.), *cert. denied*, 53 U.S.L.W. 3269 (U.S. October 9, 1984); *Systemized of New England, Inc. v. SCM, Inc.*, 732 F.2d 1030, 1034-35 (1st Cir. 1984); *Domed Stadium Hotel, Inc., v. Holiday Inns, Inc.*, 732 F.2d 480, 487-93 (5th Cir. 1984). The decision below thus is in direct conflict with every other relevant post-*Hyde* court of appeals decision. Review by this Court is necessary to resolve this conflict.

C. The court of appeals held that the mere existence of a copyright on Data General's software "created a presumption of economic power sufficient to render" the integrated hardware and software sale illegal *per se*. 734 F.2d at 1344, Petitioner's App. A at 14a-15a.[7] This presumption also eviscerates the market analysis required by *Hyde* and *Fortner II*.

A copyright protects only the author's mode of expression; it does not protect the underlying ideas, methods or

[7] Further, the court of appeals dismissed the availability of competing substitutes as immaterial to the question whether a firm has market power in the tying product market, holding instead that the market analysis mandated by *Fortner II* requires consideration of only "fungible products." 734 F.2d at 1345, Petitioner's App. A at 16a-17a. This holding makes it difficult, if not impossible, to rebut the court of appeals' presumption of market power in a copyrighted product.

processes. *Mazer v. Stein*, 347 U.S. 201, 217 (1954). While a copyright thus may protect a particular expression of a concept, it does not protect the concept itself. The existence of a copyright therefore does not prevent a competitor from offering customers a relevant and fully competitive alternative to the copyrighted software, and does not *ipso facto* create market power.[8] Whether the copyright on Data General's software created market power can be determined only after a market analysis into the extent and significance of competing software.[9] Review of the decision below is necessary to set aside the court of appeals' contrary holding.

CONCLUSION

For the foregoing reasons, Data General's petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

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[8] As the district court in this case, after hearing all the evidence, put it, any "presumption of economic power may be inappropriate in the computer software context because copyright notices do not necessarily prevent others" from offering software comparable to and performing the same function as the original program. *In re Data General Corp. Antitrust Litigation*, 529 F. Supp. 801, 816 (N.D. Cal. 1981) (footnote omitted), Petitioner's App. B at 21a, 45a.

[9] The district court stated that plaintiffs in this case offered "[n]o evidence . . . as to the actual effect of copyright notices on the development of *comparable* software." *Id.* (emphasis in original).

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